Supreme Court, U.S.
FILED
AUG 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-299
No.

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

ROYAL CENTER, INC.,

Petitioner,

vs.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226, AND BARTENDERS UNION, LOCAL 165,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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I

Questions Presented for Review

A. May a union avoid holding of this Court in *Howard Johnson Company, Inc.v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974) and attempt to bind the purchaser of assets of a defunct business to the terms of a collective bargaining agreement negotiated with a predecessor, through the artifice of compelling arbitration of its allegation that the two entities are "alter egos" absent a preliminary judicial finding that the facts before the Court are such that a colorable claim of an "alter ego" relationship exists.

B. May a court properly compel arbitration of a union's claim that the seller and purchaser of business assets are "alter egos" where the National Labor Relations Board has refused to issue a complaint on identical "alter ego" unfair labor practice charges upon the express finding, as explained by written decision and upheld upon appeal to the General Counsel, that the factual allegations, if proven, did not establish an "alter ego" relationship and did not constitute a violation of the National Labor Relations Act.

II

Parties to the Proceedings

There were no parties to the proceedings in the United States Court of Appeals for the Ninth Circuit other than those set forth in the caption of the case before this Court.

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Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner, Royal Center, Inc.,[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, heretofore entered in this case on May 22, 1985.

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[1]Royal Center, Inc. is a wholly owned subsidiary of the Horn and Hardart Company.

IV

Opinions Below

The Order and Opinion of the United States Court of Appeals for the Ninth Circuit upon rehearing of the instant cause is reported at 754 F.2d 835 (9th Cir. 1985), and is reproduced in the Appendix at pp. A-1-A-13. The Findings of Fact, Conclusions of Law and Judgment of the United States District Court for the District of Nevada is unreported, and is reproduced in the Appendix at pp. B-1-B-8. The Statement of Reason for Dismissal by the Regional Director of Region 31 of the National Labor Relations Board is unreported, and is reproduced in the Appendix at pp. C-1-C-4. The denial of appeal to the General Counsel for the National Labor Relations Board is unreported, and is reproduced in the Appendix at pp. D-1-D-2.

V

Jurisdiction

The Judgment of the United States Court of Appeals for the Ninth Circuit upon rehearing was entered on May 22, 1985. By Order issued concurrently with its Judgment, the Court of Appeals vacated its prior Opinion in this cause filed February 27, 1985. Jurisdiction before this Court is invoked pursuant to Title 28, *United States Code*, Section 1251(1). Jurisdiction before the District Court was invoked pursuant to Title 29, *United States Code*, Section 185.

VI

Statutes Involved

Section 2(9) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. § 152(9) provides as follows:

> "(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

Section 3(d) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. § 153(d) provides, in pertinent part, as follows:

> "(d) ... [The General Counsel] shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complainants before the Board, and shall have such other duties as the Board may prescribe or as may be permitted by law."

Sections 8(a)(3) and (5) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. § 158(a)3,5, provides as follows:

> "Section 8. (a) It shall be an unfair labor practice for an employer . . .
>
> (3) by discrimination in regard to hire or tenure of or any term or condition of employment to

> encourage or discourage membership in any labor organization: . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

Sections 10(a) and 10(b) of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. § 160(a), (b) provide in pertinent part, as follows:

> "Sec. 10 (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce." . . .
>
> (b) Whenever it is charged that any, person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to cause to issue and cause to be served upon such person a complaint stating the charges in that respect,". . .

Section 301 of the National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, provides in pertinent part, as follows:

> "Section 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents.". . .

VII

Statement of the Case

A. Statement of Facts

As incorporated by reference into the Findings of Fact and Conclusions of Law entered by the District Court on March 20, 1984, the following facts are undisputed:

In early 1980, petitioner, Royal Center, Inc. (hereinafter "RCI"), a Nevada corporation, completed its acquisition of a hotel and casino complex in Las Vegas, Nevada comprised of the Royal Inn Hotel and two adjacent motels, a gaming casino and restaurant and bar facilities therein. Renovations were made and the complex was renamed the Royal Americana Hotel & Casino. The hotel and casino were operated by RCI which at all times held a State of Nevada unrestricted gaming license.

The Royal Americana complex consisted of an approximately 5,000 square foot casino and 308 hotel guest rooms located in a "Tower" structure and adjacent motel structures, and was operated as a typical full-service luxury Las Vegas "strip" hotel offering a full casino with a variety of table and mechanical games, including blackjack, craps, roulette, and approximately 250 slot machines. The Royal Americana Hotel and Casino also provided beverage service through two bars, offered restaurant fare and as well, live

entertainment in its showroom. The Royal Americana Hotel and Casino did not provide fast food service, arcade games of skill and chance nor family-oriented facilities of any type.

RCI, under the fictitious business name of Royal Americana Hotel & Casino, was a party to a collective bargaining agreement with the Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartender's Union Local 165 (herein jointly referred to as "Union"). Until its closure on March 2, 1982, RCI employed, on the average, approximately 180 employees in the classifications covered by this agreement. During the same time period, i.e. through the date of its opening and March 7, 1982, the Royal Americana employed a total complement of approximately 300 employees. The 180 employees in the relevant collective bargaining unit included cooks, kitchen employees, dining room and showroom employees, cashiers and changegirls, bell desk employees, bar employees and housekeeping employees. Managerial control over all employees of the Royal Americana Hotel and casino and all facets of its operations, including labor relations, was vested exclusively in the executive and supervisory employees of RCI.

Faced with heavy operating losses and poor economic conditions, RCI determined to close its doors effective March 1, 1982, and all employees in the classifications covered under the collective bargaining agreement with the Union were terminated as of March 7, 1982. RCI concurrently terminated all other employees save several non-Union administrative employees who functioned as caretakers of the property and conducted the minimum gaming required to maintain RCI's unrestricted gaming license in the event it was determined that RCI would

operate another gaming establishment in the State of Nevada. This minimal gaming was the only service provided by RCI during the 20 month hiatus in operations between March 2, 1982 and November 20, 1983. It consisted of the operation of sixteen slot machines, eight hours a day, five days a week and one blackjack table eight hours a week. This operation occupied only a very minute portion of the physical premises which were otherwise vacant and unused. In June of 1982, RCI entered into a settlement agreement with the Hotel Employees & Restaurant Employees International Union Welfare Fund whereby RCI was released from all claims, known or suspected to exist at the time of the execution of the agreement.

On November 20, 1983, a Nevada limited partnership, 305 Convention Center Drive Associates (herein referred to as "305"), commenced operations at the same street address formerly occupied by the Royal Americana complex. 305 had acquired all the assets and the premises previously occupied by the Royal Americana complex in late 1982 with the objective of creating a new family entertainment center on substantially renovated premises. 305 is comprised of an individual general partner, Donald Schupak, who owns a 1% interest individually as general partner, a corporate general partner, Namrob Corp., and fifteen limited partners including fourteen investor limited partners and RCI, the latter of which holds a limited partnership interest equivalant to 10% of the 99% available to all limited partners. RCI's limited partnership interest is specifically subject to a one-way option exercisable by the 14 investor limited partners to purchase a prorata share of RCI's interest in 1990 or earlier upon certain conditions. No limited partner as such as any right to management or control of the enterprise. This authority is vested

exclusively in the individual general partner. RCI operates the adult gaming arcade as a concessionaire under a separate agreement, not as a limited partner, by virtue of its Nevada gaming license.

As the seller, RCI received a cash payment of approximately $77,000.00, assumption by 305 of $988,422.89 in equipment leases covering certain personal property upon which RCI was the obligor, and the benefit of a wrap-around mortgage of $14,288,170.00 payable over twenty years. RCI also obtained a twenty year concession agreement for the operation of the adult arcade, for which it is obligated to pay $58,333.00 per month to 305 through 1984, said payments to increase at the rate of 5.6% per annum thereafter.

Between September of 1982 and November of 1983, all of the structures on the property other than the "Tower" and casino of the former Royal Americana complex were demolished and a contiguous 20,000 square foot extension was constructed on adjacent property previously undeveloped. Substantial additional parking facilities were constructed where the motel structures once stood. The new facility houses an extensive family arcade and game center featuring carnival midway games, video games and supervised children's playrooms, fast food facilities offering hot dogs, pizza, sandwiches, soft drinks, beer and wine and a Riverboat Playhouse Theatre featuring periodic animated entertainment. Contiguous thereto is an "adult arcade" with approximately 250 slot machines and mechanical gaming devices. As of the date of hearing before the District Court, table games, i.e. one blackjack table, had been operated for a single eight hour period. The concession of the adult arcade gaming operation is the only function

now conducted by RCI. In June 1984, 305 reopened the refurbished hotel facilities.

RCI now employs approximately fifty employees in connection with its gaming concession, of which approximately twelve are changegirls. Other than the twelve changegirls, RCI employees no employees in the classifications set forth in the above-referenced collective bargaining agreement. In the case of the overall operations, labor relations policy is set by the general partner of 305. With regard to the adult arcade, labor relations policy is set by the concessionaire, RCI.

B. History of the Case

Shortly prior to the commencement of this action, on November 23, 1983, the Union filed unfair labor practice charges against RCI and 305 with the National Labor Relations Board ("NLRB") charging each entity with violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act (29 U.S.C. § 158(a)(1), (3) and (5)) ("NLRA"). In its charges, designated jointly as Case No. 31-CA-13688 by the NLRB, the Union asserted that RCI had refused to bargain with the Union under the prior collective bargaining agreement, and that 305 was the "alter ego" of RCI. On January 27, 1984, after complete investigation, the Regional Director of Region 31 of the National Labor Relations Board dismissed the Union's Charge and refused to issue a Complaint thereon, expressly finding that 305 was not an alter ego of RCI, and that the radical change in, and drastic reduction of, RCI's business operations excused it from any continuing bargaining obligation with respect to the Union. (See Appendix, p. C-4.) On March 27, 1984, the Union's appeal of this decision

to the General Counsel of the National Labor Relations Board was denied. (See Appendix, p. D-1.)

In the interim, on December 2, 1983, this action was brought by respondent Union against RCI in Nevada state court upon the allegations (1) that RCI had breached certain provisions of a collective bargaining agreement and (2) that RCI and 305 were "alter egos" of each other. The Union sought an order compelling RCI to submit each issue to arbitration under the agreement between RCI and the Union. A statutory basis for the Union's suit, and hence federal jurisdiction upon removal, was invoked pursuant to Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185.

On December 7, 1983, RCI removed this action to the United States District Court for the District of Nevada and on December 22, 1983, filed its Answer to the Complaint to Compel Arbitration. RCI denied the continued existence of the collective bargaining agreement relied upon by the Union, affirmatively asserted that an extended business closure followed by the sale of its assets to a third party limited partnership, 305, extinguished the prior collective bargaining agreement and any and all attendant bargaining obligations as a matter of law, and that submission of either dispute to arbitration was improper.

The matter came on for hearing before the District Court on March 5, 1984. The District Court granted the Union's Motion to Compel Arbitration with respect to two issues: (1) Whether the purchaser of the Royal Americana Complex (305) was an "alter ego" of RCI and (2) Whether RCI violated Section 29.02 of the collective bargaining agreement by failing to require 305 to assume the collective bargaining agreement. (See Appendix, pp. B-4-B-5.)

Thereafter, RCI appealed, contending that the District Court erred in referring both issues to arbitration. The matter was briefed and argued on January 17, 1985, and on February 27, 1985, the United States Court of Appeals for the Ninth Circuit filed its initial Opinion in the matter, finding that the issue regarding the alleged breach of Section 29.02 of the collective bargaining agreement[2] was properly referred to arbitration, but that the alleged "alter ego" grievance was improperly referred to arbitration in the face of a contrary finding by the National Labor Relations Board that no "alter ego" relationship had been shown, relying on the opinion of the Ninth Circuit in *Carpenters Local Union No. 1478 v. Stevens*, 743 F.2d 1271 (9th Cir. 1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 2018 (1985).

The Union then sought rehearing of the matter, contending that the Opinion filed February 27, 1985 conflicted with another ruling of the Ninth Circuit, *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275 (9th Cir. 1982). The Ninth Circuit ordered that further argument be submitted by the parties, and on May 22, 1985, entered its order granting rehearing, concurrently vacating its opinion of February 27, 1985 and entering judgment affirming submission of the "alter ego" grievance to arbitration as follows:

> "Following *Edna Pagel*, we therefore AFFIRM the district court's decision to send the alter ego issue to the arbitrator. However, the arbitrator should note that the 'supremacy doctrine,' *Haig Berberian*, 623 F.2d at 81, citing

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[2] That section required the seller of a business to require the purchaser to assume the extent collective bargaining agreement as a condition of sale.

> *Carey*, 375 U.S. at 272, requires that he give proper deference to the NLRB's earlier finding that the 305 corporation is not the alter ego of RCI. If the Union introduces additional evidence not before the NLRB, or alternative theories for an award other than the alter ego theory, the arbitrator may still make an award in the Union's favor without acting 'inconsistently' with the NLRB's earlier finding." (754 F.2d at p. 840)

Because the ruling of the Ninth Circuit raises significant and important questions regarding both the ability of a union to sidestep the holding of this Court in *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct. 2236, 41 L.Ed.2d 46 (1974) through the artifice of alleging that a purchaser of a business is an "alter ego", as opposed to a successor employer, and as well regarding the proper weight to be accorded a determination of the National Labor Relations Board founded upon its expertise in representational matters within its primary jurisdiction, and the proper role of the judiciary in ruling thereon, petitioner Royal Center, Inc. respectfully suggests that issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit is appropriate in the within cause.

VIII

Argument

A. The Blind Reference to Arbitration of a Claim of Alter Ego Relationship Between the Seller and Purchaser of Business Assets Subverts the Holding of this Court in *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board.*

The instant case presents the obverse side of the issue ruled upon by this Court in *Howard Johnson Company, Inc. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 94 S.Ct 2236, 41 L.Ed.2d 46 (1974). Therein, this Court held that a union representing employees of a selling entity could not compel the purchasing entity to arbitrate where no substantial continuity existed between the work forces of the seller and purchaser. In so holding, this Court limited its prior ruling in *John Wiley and Sons v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) to its facts, there arbitration with a purchasing entity was compelled where the facts as found *by the Court*, the merger of two entities, indicated a sufficient continuity between the entities that ". . . suggests that holding Wiley bound to arbitrate under its predecessor's collective bargaining agreement may have been fairly within the reasonable expectations of the parties" (94 S.Ct. at p. 2241).

Moreover, as noted by this Court, in *Wiley*, arbitration was sought on behalf of the current employees whose benefits were altered in the course of the merger, whereas in *Howard Johnson*, the Union sought to hold the purchaser liable to hire the former employees of the seller (94 S.Ct. at pp. 2241-2242). This latter proposition, here initially sought

by the Union, was found repugnant in view of the apt comment of this Court in *NLRB v. Burns International Security Services*, 406 U.S. 272, 92 S.Ct 1571, 32 L.Ed.2d 61 (1972) that:

> "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision."
>
> (406 U.S. at pp. 287-288, as cited in *Howard Johnson Company, Inc.*, 94 S.Ct. at p. 2243)

It is precisely this incentive to the purchaser which the Union here seeks to control through its "alter ego" tactical manuever. The Union's tactics, as enforced by the Court below without even a preliminary finding of a colorable "alter ego" claim, threatens to undermine the carefully constructed criteria governing the right of a purchaser to freely determine the nature of his business, counterbalancing the right of a union to protect its members in appropriate circumstances. Through the simple artifice of contending that the seller and purchaser are "alter egos" of one another, the Union seeks to bind the seller, and hence the purchaser as one and the same, to the terms of a labor agreement executed only by the predecessor, and hence to obtain the same result found inappropriate in *Howard Johnson, supra,* under substantially similar circumstances.

Notwithstanding the fact that the NLRB has already found the Union unable to muster a *prima facie* case of "alter ego" relationship and held RCI freed from the labor agreement due to changed circumstances, (See Appendix p. C-4), the Court below has blindly referred the issue to an arbitral forum subject to limited judicial review on a factual issue which, as will be discussed below, is one for the

judiciary to pass on in the first instance. Petitioner respectfully suggests that summary reference of "alter ego" claims to arbitration emasculates the policy enunciated by this Court in *Wiley, supra, Burns, supra,* and *Howard Johnson, supra,* which, taken as a whole, require a showing that reference to arbitration is fairly required by the facts of the case as brought before the courts. In short, before referring an "alter ego" claim to arbitration, it is incumbent upon the trial court in the first instance to factually determine that a colorable "alter ego" claim exists, such that the parties can fairly be held to arbitrate the claim. No such finding was made herein.

This precise approach, ignored by the Court below, has been properly applied by the United States Court of Appeals for the Third Circuit in addressing the question of the propriety of compelling arbitration against the seller and purchaser on an "alter ego" theory. In *American Bell Inc. v. Federation of Telephone Workers,* 736 F.2d 879 (3rd Cir. 1984), the Third Circuit first itself factually addressed the question of a "single enterprise" and "alter ego" relationship in ruling on a petition to compel arbitration, found insufficient evidence thereof, and held as follows:

> "We therefore conclude that ABI is not obligated to arbitrate its grievances with the Union under the collective bargaining agreement on the basis of some *extra-contractual theory of federal labor law.* If arbitration is required, it must be because such an obligation has been imputed to ABI on the basis of the Memorandum of Agreement."
> (736 F.2d at p. 889; emphasis added)

Of course, the extra-contractual theory of federal labor law here relied upon by the Union is "alter ego" status.

The Court below attempts to correct the anomaly of ignoring this Court's series of holdings allowing a purchaser the right to acquire a moribund business on its own terms by indication that the Union is precluded " . . . from obtaining any arbitration award from *RCI* that may be based on a contrary finding that 305 is in fact the alter ego of RCI." (754 F.2d at p. 840) However, in affirming the determination to send the "alter ego" grievance to arbitration the Court went on to conclude that "[if] the Union introduces additional evidence not before the NLRB, . . . the arbitrator may still make an award in the Union's favor without acting 'inconsistently' with the NLRB's earlier finding" (754 F.2d at p. 840) The point here is that by allowing the Union to obtain such an award without first establishing that a colorable basis for such award may exist, the Court of Appeals has sanctioned the Union's attempt to hold the alleged "alter ego's" (purchaser and seller together), to contractual terms never bargained for by the purchaser, directly contrary to the holding of this Court in *Howard Johnson, supra.*

In addition to *American Bell, supra,* a number of federal circuit courts have viewed questions of "alter ego" and "single employer" status to be properly the subject of judicial inquiry in the first instance. *See, e.g.: Carpenters Local Union No. 1846 v. Pratt-Farnsworth,* 690 F.2d 489, 509-517 and notes 10, 11 (5th Cir. 1982), *cert. denied,* ___ U.S. ___, 104 S.Ct. 335 (1983); *Board of Trustees, Container Mechanics Welfare/Pension Fund v. Universal Enterprises, Inc.,* 751 F.2d 1177, 1183-1184 (11th Cir. 1985); *Northwest Administrators, Inc. v. Con Iverson Trucking, Inc.,* 749 F.2d 1338, 1340 (9th Cir. 1984); *Florida Marble Polishers H & W Trust Fund v. Edwin M. Green, Inc.,* 653 F.2d 972, 975-977 (5th Cir. 1981), *cert. denied,* 456 U.S. 973 (1982). *See also: Service Employees Local 47 v. Commercial*

Property Services, Inc., 755 F.2d 499, 504-505 (6th Cir. 1985) (". . . a district court may not order a nonsignatory to arbitrate a labor dispute absent a specific finding that the relationship between it and the party found to the agreement is such that it too is bound to arbitrate"); *Local 6, Bricklayers Int. Union v. Boyd G. Heminger, Inc.*, 483 F.2d 129 (6th Cir. 1973). Indeed, even this Court indicated in *Howard Johnson*, 94 S.Ct. at p. 2242, Note 5, that the judicial record should contain a factual showing indicating the possibility of an "alter ego" relationship before that theory may be used to bind a purchaser to arbitrate.

The proposition that if a purchaser and seller are "alter egos", the seller (essentially for and on behalf of both parties) may be properly compelled to arbitrate that issue and that *both parties* may then be bound to the terms of a labor agreement committed to only by the seller, no more than assumes its conclusion. Absent a specific finding that sufficient evidence of an "alter ego" relationship exists so as to fairly commit the question to an arbitral forum subject to circumscribed judicial review, this position threatens to undermine the entire structure of federal labor policy concerning the respective rights and duties of the seller and purchaser of assets of a moribund business. The proposition creates a loophole in the *Howard Johnson* doctrine which may well subsume the entire holding of this Court set forth therein. Through a union's employment of the simple technique of alleging an "alter ego" relationship subject to arbitration rather than the less effective "successor employer" relationship, the freedom of a purchaser to reopen its business anew may be subject to the very arbitral forum which this Court found inappropriate in *Burns, supra*, and *Howard Johnson, supra*. That this should be so under an arbitration clause which is limited to four specific areas of dispute, none of which fairly raise the "alter ego"

question as an issue of contract terms (*see*: 754 F.2d at pp. 836-837), and in spite of the findings of the NLRB that 1) the seller is no longer bound to the labor agreement, and 2) no "alter ego" relationship exists, only exacerbates the issue.

In sum, the increasing use of the "alter ego" theory by unions bent on applying the terms of a labor agreement to a purchasing entity commands a preliminary judicial finding to the effect that sufficient facts have been presented that fairly require the parties to arbitrate the issue. Absent such a judicial safeguard, the federal labor policy heretofore set by this Court stands in serious jeopardy.

B. The Determination of the Court Below to Send the "Alter Ego" Grievance to Arbitration Despite the Express Findings of the National Labor Relations Board 1) that No Alter Ego Relationship Had Been Shown, and 2) That RCI Was No Longer Bound to the Labor Agreement Undermines the Primary Jurisdiction of the National Labor Relations Board In Matters Affecting Employee Representation.

There can be little question that the allegation here advanced by the Union that RCI and 305 are "alter egos" of one another falls within the definition of a "labor dispute" as set forth in Section 2(9) of the National Labor Relations Act, 29 U.S.C. § 152(q), within the authority of the General Counsel of the National Labor Relations Board pursuant to Sections 3(d) and 10 of the NLRA, 29 U.S.C. § 153(d), 160, to investigate and issue, or refuse to issue, an unfair labor practice complaint upon such charge. Indeed, the Union so proceeded in the instant case, filing charges with Region 31 of the National Labor Relations Board accusing RCI and 305, individually and collectively, of

violating Sections 8(a)(3) and (5) of the NLRA, by allegedly discriminating against former employees of RCI and by making unilateral changes in the terms and conditions of employment. The Union presented its charges to the NLRB as acts done as part and parcel of an "alter ego" sham transaction designed to eliminate the Union's collective bargaining relationship with RCI.

The Regional Director of Region 31 of the NLRB conducted a thorough investigation of the Union's charges, and refused to issue a complaint thereon, finding that the Union's allegations, even if proven, did not constitute a violation of the NLRB, that insufficient evidence existed to establish that 305 was an alter ego of RCI, and that RCI was no longer bound to the collective bargaining agreement due to changed circumstances. (*See*: Appendix pp. C-3, C-4) The Union appealed this decision to the General Counsel of the NLRB, advancing additional evidentiary arguments, which were considered, investigated and rejected by the General Counsel. (*See*: Appendix p. D-1)

Having failed to persuade the NLRB that it had been aggrieved through the sale between RCI and 305, the Union sought and obtained an order compelling RCI to arbitrate the very same claim presented to and rejected by the NLRB, that of an "alter ego" relationship between RCI and 305. On appeal, in its decision on rehearing, the Ninth Circuit Court of Appeals affirmed this ruling, cryptically noting that the arbitrator should give "proper deference" to the NLRB ruling, but allowing that presentation of "additional evidence", presumably no more than a scintilla, would free the arbitrator to rule as he saw fit.

At this juncture, it is important to note that no contract provision is at issue under the "alter ego" claim, rather the claim is premised solely upon the circumstances of the

relationship between seller and purchaser, the same issue whether presented to the NLRB, a court or an arbitrator. Where alternative theories encompassing a violation of the NLRA on the one hand and an alleged breach of a contract term on the other are involved, federal courts have referred the contract claim to arbitration or enforced arbitral awards based thereon despite the NLRB's refusal to process the charge of a violation of the NLRB. *See e.g.: Miller Brewing Company v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (7th Cir. 1984); *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275 (9th Cir. 1982); *Local Union No. 4, IBEW v. Radio Thirteen-Eighty, Inc.*, 334 F.Supp. 242 (E.D. Missouri 1971). However, as noted by the court below, the claim herein advanced was identical before both forums. (754 F.2d at pp. 836-837) Under these circumstances, there exists significant confusion regarding the effect of a prior NLRB determination.

In *Carpenters Local 1478 v. Stevens*, 743 F.2d 1271, 1278-1279 (9th Cir. 1984) the United States Court of Appeals for the Ninth Circuit held that a Regional Director's unit determination that two entities were not a single employer took precedence over an arbitrator's award that they were "alter egos" of one another. In *Smith v. Local No. 25, Sheet Metal Workers Int. Assn.*, 500 F.2d 741, 748, Note 4 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit suggested that express findings of the Regional Director in support of a refusal to issue a complaint would operate to shift the burden of proof in a case involving allegations of a union's breach of its duty of fair representation. In *Thomas v. Consolidation Coal Co.*, 380 F.2d 69, 78-79 (4th Cir. 1967) the United States Court of Appeals for the Fourth Circuit suggested that the NLRB's failure to issue a complaint on a charge of discriminatory discharge would " . . . serve to highlight the

opportunities which have been available to plaintiffs to have their grievances authoritatively adjudicated." Finally, in the instant case, the court below held that ". . . the arbitrator should note that the 'supremacy doctrine' [citations omitted] requires that he give proper deference to the NLRB's earlier finding that the 305 corporation is not the alter ego of RCI." (754 F.2d at p. 840)

Petitioner respectfully suggests that the confusion apparent in the foregoing cases should be resolved by this Court consistent with the principles underlying this Court's holding in *Howard Johnson*, 94 S. Ct. at p. 2243, by ". . . refusing to permit the rights and obligations of the parties to vary with the forum." *Carpenters Local Union No. 1846 v. Pratt-Farnsworth*, 690 F.2d 489, 513 (5th Cir. 1982); *Carpenters Local 1478 v. Stevens, supra*, at p. 1279. Where the issue presented to the NLRB in the first instance varies not from that sought to be arbitrated, federal labor policy fashioned from the policies governing treatment of identical unfair labor practice cases should be uniformly applied. *See: Howard Johnson, supra*, 94 S.Ct at 2239-2240; *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, supra*, at p. 513. Stated in the converse, arbitration of the Union's "alter ego" claims in the face of the NLRB's express prior rejection of that contention would impermissibly intrude into the NLRB's exercise of its primary jurisdiction under the authority of the NLRA.

In this respect, the significance of the NLRB's determination that RCI was no longer bound to the collective bargaining agreement cannot be overlooked. This exercise of the NLRB's primary jurisdiction to rule on representation matters renders inapplicable the "curative effect" of arbitration considered significant by this Court in *Carey v. Westinghouse Electric Corporation*, 375 U.S. 173,

84 S.Ct. 401, 409, 11 L.Ed.2d 320 (1964) since there properly remains no ongoing relationship between the parties. *Compare: Local No. 3-193, International Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295 (9th Cir. 1980) (judicial refusal to extend collective bargaining agreement to new locations due to encroachment upon NLRB jurisdiction to determine representation matters). Thus, through arbitration of the "alter ego" claim, the Union here attempts to hold RCI, and hence its alleged "alter ego" 305, to a collective bargaining agreement which the NLRB has found inoperative due to bona fide changed circumstances.

Were this Court not to reverse the conclusion of the court below commanding arbitration of the "alter ego" issue in the face of a contrary legal determination by the NLRB upheld on appeal, nonsensical results follow. The Regional Director assumed all allegations of the Union to be true, and found no "alter ego" situation. Had the issue been closer, a complaint may have been issued and a trial been held. If RCI had there prevailed, the Union could pursue plenary judicial review. If RCI did not prevail, its remedy in an enforcement proceeding would also include plenary judicial review. In either event, arbitration would be foreclosed. However, the Union having wholly failed to muster sufficient evidence to proceed through the administrative process, now seeks to arbitrate the same issue before an arbitral forum subject to extremely limited judicial review. Hence, under the framework constructed below, only the *weakest cases* would be afforded an alternative forum for resolution and indeed would be *removed from plenary judicial review altogether.* The incentive then for a charged party is to do whatever is necessary to force the NLRB to issue an unfair labor practice complaint in order to avoid the possibility of

duplicative proceedings and avail itself of the opportunity for judicial review on the merits.

This disincentive to dispose of meritless cases does disservice not only to the labor policy sought to be effectuated before the administrative agency with primary jurisdiction, and the litigative efficiency of that preferred forum, but as noted above, runs directly contrary to the principles espoused by this Court in *Howard Johnson, supra,* at p. 2243, echoed by the Fifth Circuit in *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc., supra,* at p. 513, that is is manifestly improper to permit the rights and obligations of the parties to vary with the forum. The Union, having been accorded full credence in its claims by the Regional Director, and failing to present even a *prima facie* case, must be foreclosed from pursuing the same claim before multiple forums in its search for a favorable result.

Accordingly, petitioner Royal Center, Inc. respectfully suggests that the Court below erred as a matter of law in compelling arbitration of the Union's "alter ego" claim in the face of a prior contrary legal determination by the NLRB on the same issue.

IX

Conclusion

For the foregoing reasons, and each of them, petitioner, Royal Center, Inc., respectfully prays that its Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit should be granted.

DATED: August 20, 1985

Respectfully submitted,

RUDIN, RICHMAN & APPEL
A Professional Corporation

BY JOHN A. LAWRENCE
Attorneys for Petitioner
ROYAL CENTER, INC.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165,

Plaintiffs-Appellees,

vs.

ROYAL CENTER, INC.,

Defendant-Appellant.

No. 84-1867

DC No. CV-LV-83-826-RDF
Nevada (Las Vegas)

ORDER

Before: CHOY, FARRIS, and BEEZER, Circuit Judges.

The petition for rehearing filed March 13, 1985, is granted.

The opinion filed February 27, 1985, is withdrawn and the attached opinion is ordered filed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165,

Plaintiffs-Appellees,

vs.

ROYAL CENTER, INC.,

Defendant-Appellant.

CA No. 84-1867

DC No. CV-LV-83-826-RDF

OPINION

Appeal from the United States District Court
for the District of Nevada
Roger D. Foley, District Judge, Presiding
Argued and submitted January 17, 1985
San Francisco, California

Before: CHOY, FARRIS, and BREEZER, Circuit Judges.
FARRIS, Circuit Judge:

Royal Center, Inc. appeals the order of the District Court for Nevada, Foley, J. presiding, which had required RCI to submit to arbitratrion two grievances arising out of RCI's collective bargaining agreement with appellee Local Joint Executive Board of Las Vegas, Culinary Workers Union et

al. RCI argues that the closure of its business terminated its collective bargaining agreement, along with any obligation to arbitrate grievances that arose after the closure occurred.

In early 1980, RCI completed its acquisition of a complex in Las Vegas, Nevada, consisting of a casino, hotel and entertainment facilities. At that time, RCI entered into a collective bargaining agreement with the Union, which represented approximately 60% of the restaurant, casino, bar and housekeeping employee at the complex.

The agreement provided an exclusive arbitration remedy for "*all* grievances." A "grievance" was broadly defined as "a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employees covered by this Agreement, or alleged violation of any provision of this Agreement." Section 29.02 of the agreement also provided that in the event RCI sold its business, RCI would require its successor to assume the Collective Bargaining Agreement with the Union.

In March 1982, accumulated operating losses caused RCI to close its complex and terminate all employees covered by the collective bargaining agreement. Several months later, RCI sold the complex to a limited partnership, 305 Convention Center Drive Associates. The sale contract did *not* require the 305 corporation to assume RCI's collective bargaining agreement with the Union, despite Section 29.02 of that agreement. The 305 corporation performed substantial alterations and reopened the complex in November 1983 as a family arcade with game center, cartoon theater, and a slot machine and mechanical gaming devices. RCI continues to operate the gaming devices, employing approximately fifty employees,

not all whom fall within the job classifications covered by the collective bargaining agreement with the Union.

Shortly after the reopening, the Union filed unfair labor practice charges with the National Labor Relations Board. The NLRB dismissed the Union's charge that 1) RCI and the 305 corporation had improperly refused to bargain with the Union, and 2) that no bona fide sale of business had occured to the 305 corporation. The Union's appeal to the General Counsel of the NLRB was denied in March 1984.

The Union sued RCI in Nevada state court in December 1983, charging the RCI had 1) violated Section 29.02 by failing to condition the sale of the complex on the 305 corporation's assumption of the collective bargaining agreement, and 2) violated the collective bargaining agreement's hiring and other substantive terms after resuming operations with the 305 corporation in November 1983. Under this second allegation, the Union argued that no bona fide, arms-length sale of the complex had occurred, and hence the new enterprise was still covered by the collective bargaining agreement between RCI and the Union.

RCI removed the action to the District Court of Nevada. The district court granted the Union's Motion to Compel Arbitration of the Union's two grievances.

RCI appeals, claiming that the district court erred in deciding 1) that the collective bargaining agreement had not been terminated by RCI's closure of the complex, and 2) that the Union's grievances fell within the scope of the arbitration clause. We have jurisdiction over RCI's timely filed appeal under 28 U.S.C. § 1291

I. DID THE ARBITRATION CLAUSE SURVIVE THE CLOSURE OF RCI'S OPERATIONS AND TERMINATION OF THE COLLECTIVE BARGAINING AGREEMENT?

The district court found that the collective bargaining agreement had not been extinguished when RCI closed its operations, and therefore that the agreement's arbitration clause continued to govern disputes arising after the closure. Because we find that the arbitration clause here survives closure regardless of whether the collective bargaining agreement generally remained in effect, we affirm the district court's decision to refer the dispute over section 29.02 to the arbitrator.

"Termination of a collective bargaining agreement does not necessarily extinguish a party's duty to arbitrate grievances arising under the contract." *O'Connor Co. v. Carpenters Local Union No. 1408*, 702 F.2d 824, 825 (9th Cir. 1983); *see Holly Sugar Corp. v. Distillery, Rectifying, Wine & Allied Workers*, 412 F.2d 899, 903-04 (9th Cir. 1969), cited with approval by *George Day Construction Co., Inc. v. United Brotherhood of Carpenters*, 722 F.2d 1471, 1479 (9th Cir. 1984). In fact, when the agreement has been extinguished by closure, we must presume that the parties intended the arbitration duty to survive. *Nolde Bros. Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 255 (1977). This presumption favoring arbitrability "must be negated expressly or by clear implication," *Nolde* 430 U.S. at 255; *see also United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960); *Federated Metals Corp. v. United Steelworkers*, 648 F.2d 856, 859 (3d Cir.) *cert. denied*, 454 U.S. 1031 (1981), and draws its vitality from federal labor policy and

the relative inexpensiveness and expertise of the arbitrator. *Nolde*, 430 U.S. at 253-55; *Holly Sugar Corp.*, 412 F.2d at 904.

RCI presents no evidence to negate the presumption that its arbitration clause, which covers "all grievances," survives the termination of the agreement. The broad definition of arbitrable "grievances"—"a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employee covered by this Agreement, or alleged violation of any provision of this Agreement," is indistinguishable from arbitration provisions held to survive termination of the collective bargaining contract. *See Nolde*, 430 U.S. at 245, 252-55 (preserving duty to arbitrate "any grievances" following closure and expiration of contract); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 553, 554 (1964) (preserving post-termination arbitration of "any differences, grievance or dispute between the Employer and the Union arising out of or relating to this agreement, or its interpretation or application, or enforcement"). The arbitration provision here survives regardless of whether the collective bargaining agreement was extinguished by RCI's closure.

II. DO THE GRIEVANCES FALL WITHIN THE SCOPE OF THE ARBITRATION CLAUSE?

We must next consider whether this particular controversy is covered by the duty to arbitrate. Like the survivability issue, the question of the scope of the arbitration duty is "a matter to be determined by the Court on the basis of the contract." *John Wiley*, 376 U.S. at 547, citing *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 241 (1962); *see Frederick Meiswinkel, Inc. v. Laborers' Union*

Local 261, 744 F.2d 1374, 1376 (9th Cir. 1984); *Salinas Cooling Co. v. Fresh Fruit and Vegetable Workers*, 743 F.2d 705, 707 (9th Cir. 1984).

Following the Supreme Court, we have emphasized that the scope of the duty to arbitrate must be read quite broadly. As we recently held, "[w]e ordinarily will not except a controversy from coverage of a valid arbitration clause 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Marchese v. Shearson Hayden Stone, Inc.*, 734 F.2d 414, 419 (9th Cir. 1984), citing *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). When, as in this instance, the parties have agreed to submit "all grievances" to an arbitrator, "[t]he courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. at 568 (footnote omitted); *see John Wiley*, 376 U.S. at 555.

Applying this lenient standard, the Supreme Court has referred for arbitration a dispute over severance pay rights, *see Nolde*, and a dispute over contractual seniority rights, *see Piano & Musical Instrument Workers, Local 2549 v. W.W. Kimball Co.*, 333 F.2d 761 (7th Cir.), *rev'd per curiam*, 379 U.S. 357 (1964), arising after a plant closing. The Court found dispositive the fact that "there is nothing in the arbitration clause that *expressly excludes* from its operation a dispute which arises under the contract, but which is based on events that occur after its termination."

Nolde, 430 U.S. at 253 (emphasis added). Without such an express exclusion, and applying the general presumption in favor of a broad scope for arbitration clauses, the Court sent the dispute to arbitration. *Id; see also John Wiley*, 376 U.S. at 554- 55.

A. The grievance over Section 29.02 was properly sent to the arbitrator.

Nolde controls our decision. The arbitration clause does not "expressly exclude" a dispute over RCI's obligation to condition its sale of business on the 305 corporation's assumption of the collective bargaining agreement. Under *Nolde* and the general presumption in favor of a broad scope for arbitration clauses, the Section 29.02 grievance was properly sent to arbitration.

This result is also consistent with circuit court decisions referring claims for severance pay, pension benefits, vacation pay, and other typical collective bargaining rights due after a plant closing. *See, e.g., United Steelworkers v. American Smelting and Refining Co., Inc.*, 648 F.2d 863 (3d Cir.), *cert. denied*, 454 U.S. 1031 (1981); *United Steelworkers v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.*, 635 F.2d 1071 (3d Cir. 1980), *cert. denied*, 451 U.S. 985 (1981); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967). All of these rights are directly implicated by Section 29.02, which works a complete transfer of severance pay, vacation, wage, seniority and other bargained-for terms to the new employer.

RCI, however, seeks to distinguish these cases as permitting arbitration only of "rights undeniably *accruing* under contract *prior to termination*." Because the benefits

arising out of Section 29.02 of RCI's collective bargaining agreement will not accrue untill *after* termination, RCI argues that arbitration is not necessarily compelled by prior cases.

RCI's focus on accrual, however, was implicitly rejected by the Supreme Court in *Nolde*, *see Federated Metals Corp.*, 648 F.2d at 861 (upholding benefits that had not even accrued until after contract expired); *Local No. 595, International Assoc. of Machinists v. Howe Sound Co.*, 350 F.2d 508 (3d Cir. 1965) (same). We have also questioned the accrual argument. *George Day Construction Co.*, 722 F.2d at 1478-79.

More importantly, RCI's distinction runs counter to the reasoning in *John Wiley*, 376 U.S. 543. The Court held that a package of wage, pension, severance and vacation pay rights, *id.* at 552, was arbitrable even after the original company merged with a new corporation and terminated the agreement. To reach its decision, the Court focused not on whether the rights "accrued" before or after the agreement was terminated, but instead on *preserving the original intent of the parties* as well as possible, when circumstances have arisen that were unanticipated when the agreement was drafted. *Id.* at 554. Because the package of rights would have been "plainly arbitrable" if the unanticipated merger had not occurred, the Court preserved their arbitrability after the merger as well.

The logic of *John Wiley* compels the arbitration of Section 29.02. The clause mandating carryover of the Union's labor contract is of no value to the bargaining Union until the contract for the sale of business is actually negotiated. This sale will frequently occur contemporaneous with or after closure of the original business—i.e., after the original contract has been terminated. Although

the parties here did not "expressly contemplate", *id.* at 554, a sale occurring after termination, the only way to preserve their intent that Section 29.02 be of any value to the Union would be to permit arbitration. In this way, rights that would have been "plainly arbitrable" had the sale occurred *prior* to termination will be preserved despite the unanticipated occurrence of a sale *after* termination.

The only result consistent with the original intent of the parties, 376 U.S. at 554—and with the presumptively broad scope of arbitration—would be to send this dispute to the arbitrator. *Cf. American Smelting and Refining Co.*, 648 F.2d at 867 (upholding arbitrator's award of benefits to employees permanently laid off for six months after expiration of contract); *Fort Pitt*, 635 F.2d at 1078 (rejecting ten-month delay between contract termination and closure as a basis for excusing employer from duty to arbitrate).

RCI raises one final argument against interpreting Section 29.02 to fall within the scope of the arbitration clause. Where there has been a virtual 100% turnover of employees, application of a collective bargaining agreement negotiated on behalf of prior employees is "fundamentally unfair to the new employee complement and saddles the new operation with an agreement ill fitting its operational needs." This argument, however, is irrelevant to the issue of arbitrability before us; it instead goes to the advisability, on policy grounds, of enforcing a contractual provision freely bargained for by RCI in 1980. Apart from the inequity of allowing RCI to escape a contract provision freely entered into, any inquiry into the merits of the provision is explicitly barred by Supreme Court precedent. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. at 568 ("[t]he courts . . . have no business weighting the merits of the grievance,

[or] considering whether there is equity in a particular claim.") (footnote omitted).

B. The "alter ego" grievance.

Because there has not been an "express exclusion" of the issue whether RCI sold its business in a bona-fide, arms-length transaction to the 305 corporation, *see Nolde*, 430 U.S. at 253, the general presumption favoring a broad scope for arbitration clauses indicates that the "alter ego" grievance was properly referred to the arbitrator.

However, the NLRB regional Director has already decided that "there is insufficient evidence that 305 Convention Drive Associates, L.P., is an alter ego of Royal Center Inc." This decision has been upheld on appeal to the NLRB General Counsel.

In *Carpenters' Union Local No. 1478 v. Stevens*, 743 F.2d 1271, 1277 (9th Cir. 1984), we recently held that the NLRB's express finding that one company was not the alter ego of the other company would preclude any extension of a collective bargaining agreement to the non-signatory, non-alter ego company. As the Joint Board properly acknowledged in oral argument, *Carpenters' Local* will preclude any attempt by the Union to enforce its collective-bargaining agreement against the 305 corporation, since the NLRB has already determined that 305 is not the alter ego of RCI.

But *Carpenters' Local* does more than bar the Union from proceeding against the *305* corporation. It also precludes the Union from obtaining any arbitration award from *RCI* that may be based on a contrary finding that 305 is in fact the alter ego of RCI. *See* 743 F.2d at 1277 (barring contractual damages against the signatory corporation that

were based on the facts that the non-signatory corporation was an alter ego). Now that the NLRB has determined that 305 is not the alter ego of RCI, the arbitrator is prohibited from making an award that is inconsistent with the NLRB's determination. *See Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 272 (1964) ("the Board's ruling would, of course, take precedence [over the arbitrator's]"); *Cannery Warehousemen, Food Processors, Drivers and Helpers v. Haig Berberian, Inc.*, 623 F.2d 77, 81 (9th Cir 1980) (citing extensive line of cases following *Carey* on this point).

On the other hand, the Union correctly notes that two Ninth Circuit cases bar us from, in effect, giving collateral estoppel power to the NLRB's finding that 305 is not the alter ego of RCI. As we held in *Edna H. Pagel, Inc. v. Teamsters Local Union 595*, 667 F.2d 1275, 1280 (9th Cir. 1982), "an NLRB refusal to issue a complaint . . . cannot prohibit the unions from obtaining relief from the dispute resolution system for which they bargained—arbitration." *See also Paramount Transp. System v. Chauffeurs, Teamsters & Helpers, Local 150*, 436 F.2d 1064, 1066 (9th Cir. 1971). Because the instant case involves the "essentially factual" determination of whether an alter ego relationship exists, *see J.M. Tanaka Const., Inc. v. NLRB*, 675 F.2d 1029, 1033 (9th Cir. 1982); *NLRB v. Lantz*, 607 F.2d 290, 295 (9th Cir. 1979); *see also Southport Petroleum Co. v. NLRB*, 315 U.S. 100, 106 (1942), we are governed by *Edna Pagel's* holding that "in cases involving issues of fact or contract interpretation the NLRB's refusal to issue a complaint does not act as res judicata or bar a party from seeking arbitration under the collective bargaining agreement." 667 F.2d at 1279-80.

Following *Edna Pagel*, we therefore AFFIRM the district court's decision to send the alter ego issue to the

arbitrator. However, the arbitrator should note that the "supremacy doctrine," *Haig Berberian*, 623 F.2d at 81, citing *Carey*, 375 U.S. at 272, requires that he give proper deference to the NLRB's earlier finding that the 305 corporation is not the alter ego of RCI. If the Union introduces additional evidence not before the NLRB, or alternative theories for an award other than the alter ego theory, the arbitrator may still make an award in the Union's favor without acting "inconsistently" with the NLRB's earlier finding.

III. CONCLUSION

"Whether or not the Union's demands have merit will be determined by the arbitrator in light of the fully developed facts. It is sufficient for present purposes that the demands are not so plainly unreasonable that the subject matter of the dispute must be regarded as non-arbitrable because it can be seen in advance that no award to the Union could receive judicial sanction." *John Wiley*, 376 U.S. at 555. Under this lenient standard, and in light of the presumption favoring both survival of an arbitration clause and a broad reading of that clause, the district court's order submitting the Section 29.02 grievance and the alter ego issue to arbitration is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165.

Plaintiffs,

vs.

ROYAL CENTER, INC.,

Defendants.

CASE NO. CV-LV-83-826, RDF

JUDGMENT

The Court having read the pleadings and papers in this case, having heard the argument of Counsel, and having rendered its Findings of Fact and Conclusions of Law,

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's grievances as set forth in its Complaint shall be submitted by Defendant to arbitration pursuant to the provisions of Article 22 of the Collective Bargaining Agreeent which is Exhibit "A" to the Complaint.

DATED this 20th day of March, 1984.

ROGER D. FOLEY
UNITED STATES DISTRICT
JUDGE

Submitted By:

JEFF D. McCOLL, III, ESQ.
1701 W. Charleston #680
Las Vegas, Nevada 89102
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS, CULINARY WORKERS UNION, LOCAL 226 and BARTENDERS UNION, LOCAL 165,

Plaintiffs,

vs.

ROYAL CENTER, INC.,

Defendants.

CASE NO. CV-LV-83-826, RDF

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

This matter came of for Hearing before the Co March 5,1984 at 10:30 o'clock A.M. Plaintiff was present by Counsel, JEFF D. McCOLL, III, ESQ. and RICHARD G. McCRACKEN, ESQ. Defendant was present by Counsel, RICHARD L. MANN, ESQ., JOHN A. LAWRENCE, ESQ. and PETER BERNHARD, ESQ. The Court having read the pleadings and papers, and heard the argument of counsel, now makes the following Findings Of Fact and Conclusions of Law and Judgment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Plaintiff is a labor organization as that term is defined in Section 2(5) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 152(5).

2. Defendant is an employer within the meaning of Section 2(2) of the Labor Management Relations Act, 1947, 29 U.S.C. Section 152(2). Plaintiff and Defendant have entered into a written Collective Bargaining Agreement governing the wages, hours and other terms of conditions of employment of employees incertain classificaions named in the Agreement. The Agreement is effective, by its terms, from April 2, 1980, through and including April 1, 1984, and thereafter as provided in the Agreement.

3. The Collective Bargaining Agreement provides a grievance and arbitration procedure in Article 22. Section 22.01 defines the subject matter which the Plaintiff and Defendant have agreed to submit to arbitration, and is very broad. Section 22.01 states:

> "For purposes of this Agreement, a grievance is a dispute or difference of opinion between the Union and the Employer involving the meaning, interpretation, application to employees covered by this Agreement, or alleged violation of any provision of this Agreement."

In Section 22.03, a procedure of adjusting grievances is provided, and is specifically stated to be exclusive.

4. The preamble to the Collective Bargaining Agreement states that the Agreement is made and entered into by and between Plaintiff and the Defendant and the Defendant's successors and assigns.

5. Section 29.02 of the Collective Bargaining Agreement provides that in the event the employer sells or assigns his business, a condition to any such sale, assignment or transfer of ownership is that the employer will obtain from the successor or successors in interest a written assumption of the Collective Bargaining Agreement and furnish a copy thereof to the Union.

6. At the Hearing, Counsel for Plaintiff agreed that the Statement of Facts contained in pages 3-9 of Defendant's Memorandum of Points and Authorities in Opposition to the Petition To Compel Arbitration is correct to the best of Plaintiff's knowledge. Said Statement of Facts is therefore incorporated herein by reference as though fully set forth. Additionally, Counsel for Defendant explained at the Hearing that of the two (2) general partners of 305 Convention Center Drive, LP, Donald Schupak and Namrob Corporation, Namrob Corporation has been formed for the purpose of taking over Mr. Schupak's responsibility as a general partner in the event he becomes disabled for any reason from performing those duties.

7. Plaintiff has raised two (2) grievances with Defendant. The first (in point of time) is that Defendant violated Section 29.02 of the Collective Bargaining Agreement by selling its business without obtaining a written assumption of the Agreement from the buyer. The second is that no bona fide, arms-length sale of the business has actually taken place, and the business operated at 305 Convention Center Drive is still covered by The Collective Bargaining Agreement between Plaintiff and Defendant. In this regard, it is alleged that violations of the Collective Bargaining Agreement have occurred since the resumption of operations at that location in November, 1983. These violations include failing to hire through the hiring hall

provided for in the Collective Bargaining Agreement, and not applying the terms and conditions of employment prescribed in the Agreement to employees in the classifications named in the Agreement.

8. Defendant has taken the position that it is not bound to the Collective Bargaining Agreement, and has not been since some time after March 7, 1982. Defendant contends that the Agreement was terminated by operation of law when the ROYAL MERICANA operation was closed and all of the employees who worked there were terminated, and there was a long hiatus before operations were resumed. Accordingly, Defendant argues, any contractual agreement to arbitrate was terminated along with the contract. Therefore, Defendant concludes, there was no Collective Bargaining Agreement in effect between it and Plaintiff when the alleged violations are said to have occurred, and furthermore, this Court cannot compel it to arbitrate those claims of violations because of the absence of any contractual agreement to arbitrate.

9. Defendant does not claim that it obtained from 305 Convention Center Drive Associates, LP, a written assumption of the Collective Bargaining Agreement, and it does not dispute the Plaintiff's claim that the terms of the Agreement are not being complied with at the "Paddlewheel" operation.

10. The parties to a Collective Bargaining Agreement will be compelled to abide by their Agreement to arbitrate their disputes, if their Agreement to arbitrate even arguably covers the dispute in question. In *United Steelworkers of America vs. American Manufacturing Company*, 363 U.S. 564, 567-68, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), the United States Supreme Court held:

> The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.
>
> The courts therefore have no business weighing the merits of the grievance, concerning whether there is equity in a particular claim, or determining whether there is a particular language in the written instrument whcih will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivoulous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware.

11. In *Communications Workers of America vs. Pacific Northwest Bell Telephone Company*, 337 F.2d 455 (CA9 1964), the Court stated:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail ***." *United Steelworkers vs. Warrior & Gulf Nav. Co.* (363 U.S. 574) at 584-585.

> But this recognizes that if evidence of intent is of the 'most forceful' character, it need not be confined to the language of the contract and it would appear clear that the decision whether such evidence dehors the agreement is of sufficient forcefulness is for the courts and not for the arbitrator. The Court, then, has not announced a rule of evidence; it has simply warned that the persuasive power of the evidence must be truth emerges with forceful clarity. We apprehend, however, that it is still for the courts to search out the truth upon this issue.
>
> Further it would appear to us to be the law that if the evidence before Court of purpose to exclude a particular claim from arbitration is not sufficiently forceful, the result is not, as appellant suggest, that the arbitrator must search for the truth at greater depth. The result, rather, is that the answer has been found and that the underlying dispute is arbitrable. If the true intent of the parties is to remain our concern, therefore, it would seem important that we be not required to close our eyes to all but the uncertain writing itself."

12. The grievances raised by the Plaintiff here are clearly within the broad coverage of Article 22 of the Collective Bargaining Agreement between Plaintiff and Defendant, which by its terms was in effect at all times material to this case, and is still in effect. Only the "most forceful" evidence that the parties intended to exclude a given subject from arbitration will suffice to overcome the presumption in favor of arbitrability, and Defendant here

has not produced such evidence. Therefore, the Petition to Compel Arbitration will be granted.

DATED this 20th day of March, 1984.

ROGER D. FOLEY
UNITED STATES DISTRICT
JUDGE

Submitted By:

JEFF D. McCOLL, III, ESQ.
1701 W. Charleston #680
Las Vegas, Nevada 89102
Attorney for Plaintiffs

Approved as to form and content:

[not approved]

Disapproved as to form and content:

PETER C. BERNHARD, ESQ.
Schreck, Sloan, Bernhard & Jones
600 E. Charleston
Las Vegas, Nevada 89104
Attorney for Defendants

RECEIPT OF COPY

RECEIPT OF COPY of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT is hereby acknowledged this 16th day of March, 1984.

SCHRECK, SLOAN, BERNHARD & JONES

BY: PETER C. BERNHARD, ESQ.
600 E. Charleston
Las Vegas, Nevada 89104
Attorneys for Defendants

APPENDIX C

NATIONAL LABOR RELATIONS BOARD

REGION 31

(Letterhead)

Mr. Richard G. McCracken, Esquire
100 Van Ness Avenue, 9th Floor
San Francisco, CA 94102

Re: Royal Center, Inc. d/b/a
Royal Americana Hotel
Case 31-CA-13688

305 Convention Center Drive
Associates, LP
Case 31-CA-13687

Dear Mr. McCracken:

The above-captioned case(s) charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge(s) are warranted for the reason(s) set forth on the attached statement of reason for dismissal. I am, therefore, refusing to issue complaint herein.

Pursuant to the National Labor Relations Board Rules and Regulations, Series 8, as amended, you may obtain a review of this action according to the enclosed instructions.

Very truly yours,

Roger W. Goubeaux
Regional Director

3 Enclosures
Statement of reason for dismissal
Form NLRB-4938, Procedure for Filing An Appeal
Form NLRB-4767, Notice of Appeal

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

cc: General Counsel, Attn.: Office of Appeals, National Labor Relations Board, Washington, D.C. 20570

Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226 and Bartenders Union, P.O. Box 14396, Las Vegas, NV 89114

Mr. Richard L. Mann, Esquire, Rudin, Richman & Appel, 9601 Wilshire Blvd., Penthouse, Beverly Hills, CA 20210

Mr. John A. Lawrence, Rudin, Richman & Appel, 9601 Wilshire Blvd., Penthouse, Beverly Hills, CA 90210

STATEMENT OF REASON FOR DISMISSAL

Re: Royal Center, Inc. d/b/a
Royal Americana Hotel
Case 31-CA-13688

305 Convention Center Drive
Associates, LP
Case 31-CA-13687

The factual allegations, if proven, do not constitute a violation of the Act.

In this regard, we note that there is insufficient evidence that 305 Convention Center Drive Associate, L.P. is an alter ego of Royal Center Inc. d/b/a Royal American Hotel because:

1. There is no evidence that the predecessor, though a limited partner, continues to exercise any managerial control over the successor and, in particular, over the labor relations policies of the successor. *John Fender Electric Co.*, 244 NLRB 957.

2. Part ownership is insufficient to establish that the predecessor controls the successor where, as here, the ownership devolved, in accordance with the original intent of the partnership, to a minority interest before the facility reopened and where, as here, the partnership agreement excludes the limited partners from any managerial authority.

3. The intimate involvement of Schupak with the predecessor does not give rise to the inference that the successor is other than an indepedent business entity. *Radiant Fashions, Inc.*, 202 NLRB 938. The Board will find alter ego status where the successor formed by officials of the predecessor lacks real independence. *Circle T Corporation*, 238 NLRB 245. Such evidence is lacking here.

4. RCI operates the gaming and bar business in the successor's premises. Even ignoring RCI's representation that it will surrender the bar business to 305, there is insufficient evidence in the Region's view that this is less than an arm's length business arrangement. RCI leases it portion of the facility and pays a rental of $58,000 a month. Moreover, 305 could not operate the gaming business had it wished to, since it lacks a license.

5. Riverboat Management (RM) existed prior to the creation of 305 and engaged in the same type of business that it has contracted to engage in at the 305 facility. Moreover, 305 has retained control over the labor relations policy of the employees that RM's subsidiary, Riverboat Management Company of Nevada, supervises.

We also note that 305 Associates, L.P. was free as the successor to R.C.I. to set the initial terms and conditions of employment. *Burns International Detective Agency, Inc. v. NLRB*, 406 U.S. 272. In our review, the altered nature of R.C.I.'s remaining business operation, the reduced employee complement and unrepresentative number of employee classifications excuses the Employer from a continued bargaining obligation. *Van's Packing Plant*, 211 NLRB 692 and *GT&E Data Services Corporation*, 194 NLRB 719.

Lastly, we note the failure to use the contractually established hiring hall, absent more, does not establish that the Employer unlawfully refused to hire R.C.I.'s former employee's.

APPENDIX D

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

(Letterhead)

Richard G. McCracken, Esq.
100 Van Ness Avenue, 9th Fl.
San Francisco, CA 94102

Re: Royal Center, Inc. d/b/a
Royal Americana Hotel
Case 31-CA-13688

305 Convention Center Drive
Associates, LP
Case 31-CA-13687

Dear Mr. McCracken:

Your appeal from the Regional Director's refusal to issue complaint in the above-captioned case has been duly considered.

The appeal is denied substantially for the reasons set forth in the "Statement of Reason For Dismissal" attached to the Regional Director's letter of January 27, 1984. Contrary to your contention on appeal, the evidence indicates that Royal Center, Inc. did sell the hotel to 305 Convention Center Drive Associates.

Accordingly, further proceedings herein were deemed unwarranted.

Very truly yours,

William A. Lubbers
General Counsel

By Mary M. Shanklin, Director
Office of Appeals

cc: Director, Region 31

Local Joint Executive Board of Las Vegas, Culinary Wkrs. Union, Local 226 and Bartenders Union, P.O. Box 14396, Las Vegas, Nevada 89114

Richard L. Mann, Esq., Rudin, Richman & Appel, 9601 Wilshire Blvd., Penthouse, Beverly Hills, California 20210

John A. Lawrence, Esq., Rudin, Richman & Appel, 9601 Wilshire Blvd., Penthouse, Beverly Hills, California 90210

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 3550 Wilshire Boulevard, Suite 916, Los Angeles, California. On this date, August 20, 1985, I served the within PETITION FOR WRIT OF CERTIORARI in re: "Royal Center, Inc. vs. Local Joint Executive Board of Las Vegas, Culinary Workers Union, Local 226, and Bartenders Union, Local 165" in the Supreme Court of the United States, October Term, 1985, No....
on the persons interested in said action by placing 3 true copies thereof enclosed in sealed envelopes with first class postage prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

RICHARD G. MC CRACKEN, ESQ.
9th Floor
100 Van Ness Avenue
San Francisco, CA 94102

All parties required to be served have been served.

I certify (or declare) under penalty of perjury that the foregoing is true and correct.
Executed on August 20, 1985
at Los Angeles, California.

Kathleen Kolstad

Supreme Court, U.S.
FILED
SEP 23 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-299

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

ROYAL CENTER, INC.,
Petitioner,

VS.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226, and
BARTENDERS UNION, LOCAL 165,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

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No. 85-299

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

ROYAL CENTER, INC.,
Petitioner,

VS.

LOCAL JOINT EXECUTIVE BOARD OF LAS VEGAS,
CULINARY WORKERS UNION, LOCAL 226, and
BARTENDERS UNION, LOCAL 165,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SUPPLEMENTAL STATEMENT OF FACTS

The facts set forth in this section should be considered for a full understanding of this case.

RCI[1] and the Joint Board[2] were parties to a collective bargaining agreement which was effective, by its terms, from April 2, 1980 through and including April 1, 1984, and thereafter if neither party moved to terminate. (Petition, Appendix B, p. 4, para. 2). All the events concerning the suspension of operations by RCI the sale of its business to a limited partnership it formed,

[1] Petitioner Royal Center, Inc.

[2] Respondent Local Joint Executive Board of Las Vegas.

and the resumption of operations by the limited partnership, occurred within the stated term of the agreement.

After operations were resumed in November, 1983, the Joint Board filed this action against RCI in December, 1983. (Petition, Appendix A, pp. 3-4). The Joint Board sought to compel arbitration of two grievances which were alternative in character. The first grievance was that RCI violated Section 29.02 of the agreement by selling its business without obtaining a written assumption of the agreement from the buyer. The second was that no bona fide, arms-length sale of the business had actually taken place, and that the business was being operated by 305[3] as an alter ego of RCI. (Petition, Appendix B, p. 5, para. 7). 305 was not joined as a party, and no relief was sought as to it.

Section 29.02 of the collective bargaining agreement provides that in the event the employer sells or assigns his business, a condition to any such sale, assignment or transfer of ownership is that the employer will obtain from the successor or successors in interest a written assumption of the collective bargaining agreement. (Petition, Appendix B, p. 5, para. 5).

As to the alter ego grievance, the preamble to the agreement states that it is made and entered into by and between the Joint Board and RCI, and RCI's successors and assigns. (Petition, Appendix B, p. 4, para. 4).

ARGUMENT

A. Introduction

RCI has in its petition radically changed its tack from the course pursued in the Court of Appeals. There, it argued that it had no duty to arbitrate either of the Joint Board's grievances because of the hiatus between its suspension of operations and the reopening, although both occurred within the stated term of the collective bargaining agreement. (*See* Appendix A, p. 4). Now, RCI does not challenge the decision of the Court of Appeals that it had a general duty to arbitrate grievances arising under the

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[3] 305 Convention Center Drive, L.P.

agreement, and that the issue whether it breached the provision of the agreement requiring it to obtain a written assumption of the agreement from any buyer was properly referred to arbitration. In the petition, RCI has narrowed its attack to the question whether the Joint Board's alternative grievance, based upon an alter ego theory, should also have been ordered to arbitration. On this limited question, it argues that the order is inconsistent with *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board,* 417 U.S. 249 (1974), and that the decision of the General Counsel of the National Labor Relations Board not to issue a complaint on parallel charges filed by the Joint Board should be given some sort of issue-preclusive effect.

B. The Judgement Below, Compelling RCI to Arbitrate a Grievance Pursuant to a Contract to Which It Is a Signatory Party, Is Fully Consistent with This Court's Rulings, Including the *Howard Johnson* Case

The decisions of the courts below are absolutely in accord with the teachings of *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, supra,* the case upon which RCI relies. In *Howard Johnson* the seller, RCI's counterpart, admitted its obligation to arbitrate, and this was given by the court as one of the reasons why the buyer should not be required to submit to arbitration. *Id.,* 417 U.S. at 253, 257-258.

The Joint Board is *not* trying to bind 305 to the collective bargaining agreement or the collective bargaining obligation, or indeed to impose any liability on it. (*See* Petition, Appendix A, p. 11). The only party the Joint Board seeks to compel to arbitrate is RCI, an employer admittedly bound to the collective bargaining agreement.

Not only is RCI the only party, but its potential liability in arbitration is limited to the term of the collective bargaining agreement. The Joint Board made this clear at oral argument in the Court of Appeals, and it is the only sound position for the Joint Board to take in the circumstances of this case. The collective bargaining agreement between the RCI and the Joint Board was still in effect, by its terms, when operations were suspended by RCI, when RCI sold the business to 305, and when

the establishment was reopened for business by RCI and 305 in November, 1983. The liability of RCI under the alter ego theory is necessarily limited to the period between November, 1983 and the date when the collective bargaining agreement expires by its terms. After the expiration of the agreement, recognition of the union and any continued effect of the collective bargaining agreement depends entirely on the view of the National Labor Relations Board on the alter ego question. Only the NLRB can impose a bargaining obligation on an employer in interstate commerce. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). After the expiration of a collective bargaining agreement, some of its terms and conditions may remain in effect, but only in the sense that an employer may not change such terms and conditions, absent impasse or agreement, without committing an unfair practice. *NLRB v. Katz*, 369 U.S. 736 (1962); *NLRB v. Hinson*, 428 F.2d 133 (CA8 1970). The adjudication of unfair labor practices is of course within the exclusive jurisdiction of the NLRB. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). Here, because the NLRB declined to impose any continuing bargaining obligation on RCI or 305, the collective bargaining agreement can have no effect beyond the end of its term. *See U.S. Gypsum Co. v. Steelworkers*, 384 F.2d 38 (CA5 1967), certiorari den., 389 U.S. 1042 (1968).

Therefore, the all-important distinction between *Howard Johnson* and this case is that in *Howard Johnson*, the union already had the predecessor's agreement to arbitrate its liability, which is all the union has obtained from the courts below. But in *Howard Johnson*, the union sought to make the alleged successor a party to an arbitration under a contract it never agreed to, and of course to impose liability upon it under that contract. Nothing of this sort is attempted here. There is no circumvention or inconsistency with the rules developed by the Court governing successorship situations. Rather, the decision of the Court of Appeals falls squarely within that framework.

Aside from *Howard Johnson*, the other authority relied upon by RCI is *American Bell, Inc. v. Federation of Telephone Workers*, 736 F.2d 879 (CA3 1984). This case is, however, distinguishable on precisely the same, fundamental grounds as *Howard*

Johnson: it involved an attempt by a union to bind to a collective bargaining agreement an entity not signatory to it. The same is true of all the other cases cited by RCI. (*See* Petition, pp. 16-17).[4]

C. The Decision of the NLRB's General Counsel Not to Issue a Complaint Is an Exercise of Prosecutorial Discretion Not Entitled to Any Issue-Preclusive Effect

As a general rule, decisions of a tribunal are given issue-preclusive effect only as to issues which have been fully and fairly litigated by the interested parties. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332, 99 S.Ct. 645, 58 L.Ed. 2d 552 (1979). In the procedure of the National Labor Relations Board, the decision to dismiss an unfair labor practice charge is not the culmination of litigation, but rather is a determination that there will be no litigation. It is established that such a decision has no issue-preclusive effect. *Miller Brewing Co. v. Brewery Workers Local Union No. 9*, 739 F.2d 1159 (CA7 1984); *Edna H. Pagel v. Teamsters, Local 5995*, 667 F.2d 1275, 1279-81 (CA9 1982); *United Steelworkers of America v. Fort Pitt Steelcasting Division-Conval-Penn, Inc.*, 635 F.2d 1071, 1080 (CA3 1980), certiorari den., 451 U.S. 985, (1981); *Paramount Transportation System v. Teamsters, Local 150*, 436 F.2d 1064 (CA9 1971). The decision not to issue a complaint is simply the exercise of prosecutorial discretion. *Miller Brewing Co., supra.*

In the procedure followed by the National Labor Relations Board, when an unfair labor practice charge is filed it is investigated administratively by the Regional Director in whose area the charge arose. The Regional Director acts as the delegate of the Board's General Counsel. The General Counsel is the Board's prosecutorial arm. 29 C.F.R. Sections 202, 203.1. Evidence concerning an unfair labor practice charge is taken by the Regional Director from the charging and charged parties privately. There is no opportunity to hear the opposing party's evidence, much less to confront and cross-examine witnesses. There is no opportunity to

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[4] Additionally, most of the other cases did not even involve attempts to compel arbitration, but were suits to collect delinquent employee benefit fund contributions.

subpoena witnesses or documentary evidence. The charged party is not even obligated to cooperate with the Regional Director's investigation. 29 C.F.R. Section 101.4; NLRB Casehandling Manual Sections 10056, 10058.

The decision of the Regional Director may be appealed to the General Counsel. It is established that the General Counsel has wide prosecutorial discretion, and the decision whether or not to issue complaint is not judicially reviewable. *Vaca v. Sipes,* 386 U.S. 171, 182 (1967).

The decision of an NLRB Regional Director not to issue complaint is no different, and is entitled to no greater weight, than a decision not to prosecute made by a district attorney, the United States Attorney, the Federal Trade Commission, etc.

In this case, the General Counsel decided not to issue a complaint on the charges filed by the union contemporaneously with the filing of this action. There was no hearing, only an administrative investigation culminating in an exercise of prosecutorial discretion. The General Counsel, through the Regional Director, gave reasons for the decision not to issue complaint, which is typical, but did not and could not make any findings on issues of fact or law fully and fairly litigated between the parties.

There is not the conflict or confusion on this point that RCI suggests. Some cases have held that the refusal to issue complaint, while not issue-preclusive, may be given evidentiary weight. *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (CA5 1974); *Thomas v. Consolidated C.,* 380 F.2d 69 (CA4 1967). In the principal case relied upon by RCI for the proposition that there is conflict, *Carpenters Local 1478 v. Stevens,* 743 F.2d 1271, 1278-1279 (CA9 1984), an entirely different question was presented. In *Stevens,* the issues deemed precluded were decided by the Labor Board after a representation hearing, in which the parties had the opportunity to, and apparently did, fully and fairly litigate the issues. Therefore, it is fully distinguishable from this case on a point of fundamental legal significance.

RCI's effort to induce a departure from settled doctrine in this case is based on erroneous concepts. It repeatedly suggests in its petition, while never saying it straightforwardly, that the Joint Board is somehow bound to the General Counsel's point of view by an election of remedies. But "whether particular conduct constitutes an unfair labor practice is a distinct question from whether [an employer] must arbitrate a grievance resulting from such conduct." *United Steelworkers of America v. Fort Pitt, supra* at 1080.

Labor Board proceedings and contractual arbitrations are governed by completely different sources of law. The Labor Board proceedings are, of course, governed by the Labor Management Relations Act. But arbitrations are, and must be, governed by the private law of the parties' collective bargaining agreement. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). The interpretation and enforcement of such agrements is entrusted to the courts, not the Board. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 427 (1967).

Here, the Board's General Counsel decided not to pursue a complaint to impose upon RCI or 305 a continuing obligation to bargain with the Joint Board. Contrary to RCI's suggestion, the General Counsel did *not* purport to free RCI from its obligations under the existing collective bargaining agreement. (*See* Petition, Appendices C and D). Thus, RCI's suggestion of an intolerable conflict is unfounded. The issues before the NLRB and in arbitration are superficially similar, but the governing sources of law are different. This is not forum shopping, for the Joint Board has pursued *independent* rights in the proper forum for each.

This is also not a case of a disappointed litigant turning to a different forum. As shown in RCI's own statement of the history of this case (Petition, pp. 9-10), but contrary to the suggestions in its argument (Petition, p. 19), the Joint Board pursued its separate remedies simultaneously, and in fact won in the District Court before it lost its appeal to the General Counsel.

CONCLUSION

The petition should be denied.

Dated: September 20, 1985

Respectfully submitted,

PHILIP PAUL BOWE
RICHARD G. MCCRACKEN
DAVIS, COWELL & BOWE
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